

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WIRELESS TELECOMMUNICATIONS BUREAU AND  
WIRELINE COMPETITION BUREAU**

\_\_\_\_\_  
In the Matter of )

Accelerating Wireline Broadband Deployment )  
by Removing Barriers to Infrastructure )  
Investment )

CTIA Petition for Declaratory Ruling, )  
WIA Petition for Rulemaking, and WIA Petition for )  
Declaratory Ruling )

WC Docket No.: 17-84  
WT Docket No.: 19-250  
RM-11849

**INITIAL COMMENTS OF THE ELECTRIC UTILITIES  
IN OPPOSITION TO CTIA'S PETITION FOR DECLARATORY RULING  
ON POLE ATTACHMENT ISSUES**

**Filed by:**

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## **EXECUTIVE SUMMARY**

- The Commission should deny CTIA’s request for declaratory ruling with respect to the three pole attachment issues raised in its petition. Each of the requested declaratory rulings would be contrary to the law, contrary to Commission precedent, harmful to deployment of the next generation of advanced communications infrastructure, or all of the above.
- **The Commission should deny CTIA’s request to define the term “pole” within Section 224 to include utility-owned lighting assets.** Lighting assets (including the posts, standards, poles, brackets and other structures that support street and/or outdoor area lighting) are not “poles” within the meaning of Section 224. Legislative history is clear that the “poles” covered by the statute are “utility poles” which the courts have defined to include a utility’s “distribution facilities.” Structures that exist primarily or exclusively for the purpose of supporting street and/or outdoor area lighting are not distribution facilities and, unlike distribution facilities, exist solely because of a specific customer request at a specific location. Even the Commission’s own precedent draws a distinction between the “utility poles” covered by Section 224 and other structures whose primary purpose is to provide lighting.
- **Even if the Commission believes it can assert jurisdiction over utility-owned lighting assets, it should decline to exercise such jurisdiction.** The vast majority of structures that exist primarily to support street and/or outdoor area lighting require replacement (with special multi-use support structures) in order to accommodate wireless antenna equipment installations. This is especially true in highly-populated areas where the desire for wireless network densification is the greatest. Commission regulation will stifle the innovation, cooperation and collaboration necessary to make streetlight collocation a reality, and one of two things will occur: either (1) wireless deployment will suffer; or (2) the public will suffer because of duplicative infrastructure. Both are results the Commission can, and should, avoid.
- **The Commission should deny CTIA’s request to establish overly broad limitations on a utility’s non-discriminatory electric distribution construction standards.** Wireless infrastructure providers made this same request to the Commission just over a year ago, and the Commission correctly denied the request. The Commission has long held that individual utilities are allowed to adopt their own construction standards and practices. CTIA, though, frames all construction standards that places any limitation on the type, amount or location of certain pole-mounted equipment as a denial of access for which the utility owes an individual pole-by-pole explanation. This is neither required by the Commission’s existing precedent nor practical.
- **Electric distribution construction standards, in addition to protecting the shared infrastructure, benefit deployment efforts by creating a common understanding and expectation.** CTIA, it seems, would prefer that wireless providers submit applications for the attachment of equipment that an electric utility already knows it will deny given the

characteristics of the equipment and/or the characteristics of a particular type/configuration of pole. This is a massive waste of time for both the electric utility and the wireless provider. If a wireless provider has a problem with a particular electric distribution construction standard, it can challenge the lawfulness of that particular standard through the Commission's complaint process or work together with the electric utility towards a constructive resolution.

- **The Commission should deny CTIA's request to undermine the scope of negotiated solutions within pole license agreements.** The Commission has, since the original enactment of Section 224, regularly expressed its preference for negotiated solutions to contract issues. CTIA's request not only would undermine 40 years of Commission precedent but also would undermine efforts to solve the deployment challenges of today and tomorrow. As the demand for limited pole space increases, and as the challenges associated with deployment of the next generation of advanced communication infrastructure unfolds, the need for creative solutions increases. The attachments of today are not through-bolts on uncrowded poles supporting a single strand over short distances. They are wireless antenna installations with multiple pieces of equipment on different parts of the pole, or they are fiber loops covering long distances over already-crowded pole networks.
- **In any event, parties to a pole license agreement negotiation hardly ever agree on whether a provision conflicts with Commission rules.** Attaching entities and pole-owning utilities often have different understandings of the Commission's rules and other precedent. What an attaching entity might contend is "black letter law" can be, in the view of the pole owning utility, a fringe interpretation that ignores the laws of the universe. CTIA's requested declaratory ruling would only add further obstinance to the already-challenging process of negotiating a pole license agreement.

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ON POLE ATTACHMENT ISSUES**

Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company and Tampa Electric Company (collectively the “Electric Utilities”) respectfully submit the following comments in opposition to three of the declaratory rulings requested in CTIA’s Petition for Declaratory Ruling in the above-referenced docket.<sup>1</sup> For the reasons set forth below, the Commission should deny CTIA’s requested relief.

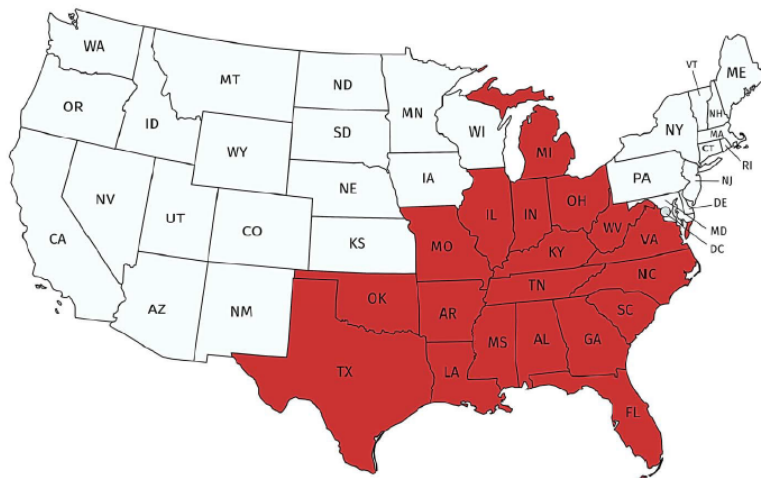
**INTRODUCTION**

The Electric Utilities, either directly or through their operating company subsidiaries and affiliates, provide electric and lighting service to customers in 19 states and numerous metropolitan

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<sup>1</sup> Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (released Sept. 13, 2019).

areas. The Electric Utilities collectively own and maintain more than 20 million distribution poles, many of which host third-party attachments. The Electric Utilities also own numerous and varied types of structures used solely or primarily in the provision of street and outdoor area lighting. The Electric Utilities operate in 19 different states across the Southeast and Midwest:



13 of these states are among the 21 states in which pole attachments are currently regulated by the Commission. *See States that Have Certified that They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd. 5541 (May 19, 2010) (“2010 Public Notice”).<sup>2</sup>

Ameren Service Company is a wholly-owned subsidiary of Ameren Corporation (“Ameren”). Ameren Service Company provides administrative and technical services to Ameren and its subsidiaries, including its operating company subsidiaries—Ameren Illinois Company d/b/a Ameren Illinois and Union Electric Company d/b/a Ameren Missouri. Ameren Illinois and Ameren Missouri own electric distribution infrastructure, including a substantial number of utility

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<sup>2</sup> The 13 states referenced does not include Illinois, over which the FCC exercises jurisdiction over the rate, terms, and conditions for telecommunications carrier attachments to electric utility poles. *In the Matter of Crown Castle Fiber LLC, Complainant, v. Commonwealth Edison Company, Defendant*, No. 19-169, No. 19-170, Order, 34 FCC Rcd. 5959, 5960-61 at ¶ 5 (Jul. 15, 2019).

poles, in Illinois and Missouri. Ameren’s operating companies provide electric power service to more than 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois. Ameren Illinois and Ameren Missouri also provide lighting service to customers in their service territories and own numerous structures, the sole or primary purpose of which is to provide street or outdoor area lighting.

American Electric Power Service Corporation (“AEP Service Corp.”) is a wholly-owned subsidiary of American Electric Power Company, Inc. (“AEP”). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP is one of the largest investor-owned electric utilities in the United States with more than 5 million customers linked to its electricity transmission and distribution grid covering 197,500 square miles. AEP, through its operating company subsidiaries, owns and operates electric distribution infrastructure in eleven states across the Midwest and Southeast: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. AEP has approximately 250,000 non-distribution streetlight support structures across its combined service territory.

Duke Energy Corporation (“Duke Energy”) is an electric power holding company. Through its operating company subsidiaries—Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Duke Energy Florida, LLC, Duke Energy Kentucky, Inc., Duke Energy Indiana, LLC and Duke Energy Ohio, Inc.—Duke owns electric distribution infrastructure, including a substantial number of utility poles, in Florida, Indiana, Kentucky, North Carolina, Ohio, and South Carolina. Duke Energy owns an estimated 1.5 million street and outdoor lighting structures and has approximately 625,000 street and outdoor lighting customers.

Entergy Corporation (“Entergy”) is an electric utility holding company. Through its operating company subsidiaries—Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy



Mississippi, LLC, Entergy New Orleans, LLC, and Entergy Texas, Inc.—Entergy owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Louisiana, Mississippi and Texas. Entergy owns approximately 1.2 million lighting support structures across its combined service territories.

Oncor Electric Delivery Company LLC (“Oncor”) is an electric utility serving more than 400 cities and 91 counties in Texas, nearly one-third of the state’s geographic area and in the country’s highest-growth region in electric demand, according to the North American Electric Reliability Council. Oncor’s current service area includes the Dallas-Fort Worth metro area, as well as Midland/Odessa, North Austin, Round Rock, Killeen, Waco, Wichita Falls and Tyler. Oncor owns a substantial number of electric distribution poles, delivering power to more than 3.6 million homes and businesses, and operates more than 138,500 miles of transmission and distribution lines in Texas. Oncor also provides lighting service and owns 160,000+ lighting support structures.

Southern Company (“Southern”) is one of the largest generators of electricity in the nation, serving both regulated and competitive markets across the southeastern United States. Southern, through three retail operating companies—Alabama Power Company, Georgia Power Company and Mississippi Power Company—supplies energy to more than 4.68 million customers with 172,000 miles of power lines and a service territory spanning most of Georgia, Alabama and southeastern Mississippi. Collectively, Southern’s operating companies own more than 1 million non-distribution lighting support structures.

Tampa Electric Company (“Tampa Electric”), headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899. Tampa Electric’s service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas

Counties. Tampa Electric serves nearly 670,000 residential, commercial and industrial customers. Tampa Electric owns approximately 307,000 electric distribution poles. Tampa Electric also provides lighting service to customers in its service area and owns numerous structures, the sole or primary purposes of which is to provide street or outdoor area lighting.

**I. THE COMMISSION SHOULD DECLINE CTIA’S REQUEST TO EXTEND THE COMMISSION’S POLE ATTACHMENT JURISDICTION TO INVESTOR-OWNED UTILITY LIGHTING ASSETS.**

**A. The Commission’s Jurisdiction under Section 224 Does Not Encompass Investor-Owned Lighting Assets.**

CTIA asks the Commission to “clarify that the term ‘pole’ as used in Section 224 and the Commission’s rules includes utility-owned light poles.” CTIA Pet. at 21. CTIA argues that the Commission has jurisdiction over utility-owned lighting assets because Section 224 does not define the term “pole” and that the term “pole” should be given its “ordinary meaning” (which CTIA contends includes lighting assets). *Id.* at 23. CTIA’s expansive interpretation of the Commission’s jurisdiction under Section 224 is directly contradicted by legislative history, judicial precedent, and Commission precedent.<sup>3</sup>

**1. Legislative History Shows That Congress Intended for Section 224 To Vest the Commission with Jurisdiction Over “Utility Poles” Only.**

Since Congress adopted Section 224 more than 40 years ago, Section 224 has never been construed as providing the Commission with jurisdiction over utility-owned lighting assets. This demarcation of Commission jurisdiction is not a product of chance; rather, Congress intended that the Commission’s jurisdiction over utility-owned assets be circumscribed. According to the

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<sup>3</sup> To be clear, the Electric Utilities do not contend that distribution poles with streetlights are outside the Commission’s jurisdiction. The support structures at issue, here, are those that exist exclusively or primarily for the purpose of street and/or outdoor area lighting.

Committee Report preceding the adoption of Section 224, Congress intended to provide the Commission with jurisdiction over a specific type of “pole”—the “utility pole”:

### **SUMMARY AND PURPOSE**

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space **on utility poles**, ducts, conduits, or other rights-of-way owned or controlled by those utilities....

### **POLE ATTACHMENT REGULATION**

S. 1547, as reported, would empower the commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers **of utility poles**. A pole attachment, for purposes of this bill, is the occupation of space **on a utility pole** by the distribution facilities of a cable television system—coaxial cable and associate equipment—under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole—usually a telephone or electric power company.

S. REP. NO. 95-580, at 1-2 (1977) (bold-underline emphasis added). The Committee Report uses the term “utility pole” 27 times. Similarly, the opening provision of Section 224 describes its purpose as follows: “An Act [t]o amend the Communication Act of 1934 to provide for the regulation of **utility pole** attachments.” Communications Act Amendments of 1978 (“Pole Attachments Act”), Pub. L. 95-234, 92 Stat. 33, 33 (1978). In contrast, neither the Committee Report nor the Act itself contains a single reference to any form of lighting asset (e.g., streetlights, lampposts, light standards, light poles, lighting brackets, etc.).

Further, in a Committee Report preceding the 1996 amendments to Section 224, Congress once again reiterated its intent to limit the Commission’s jurisdiction to “utility poles:”

Sec. 205. Pole attachments

Section 205 of the reported bill amends section 224 of the 1934 Act, the pole attachment provisions. Section 224, which was added to the 1934 Act in 1978, requires the FCC to ensure that the rates, terms, and conditions for attachments by cable television systems to poles, ducts, conduits, and rights-of-way owned or controlled by utilities, including telephone companies, are just and reasonable.

**Section 205 modifies section 224 of the 1934 Act to require that access to utility poles be granted to cable operators,** whether the attachment is used to provide cable services or telecommunications services.

S. REP. NO. 104-23, at 40 (1995) (emphasis added). However, neither the 1996 amendments nor any of its legislative history contains a single reference to lighting assets. The fact that lighting assets have, to date, been generally understood as falling outside the Commission’s pole attachment jurisdiction is not a 40-year coincidence. It is the result of statutory limitations.

**2. Judicial Precedent Confirms that Commission Jurisdiction Under Section 224 Is Limited To “Distribution Facilities.”**

As noted above, in advocating for an expansive interpretation of the term “pole,” CTIA notes that “pole” is not a defined term under Section 224 and that it should be given its “ordinary meaning.” CTIA Pet. at 23. According to CTIA, a “pole” would include **any** pole owned or controlled by a utility—presumably including flag poles, totem poles or any other type of pole owned by a utility, regardless of its function or purpose. *Id.* CTIA’s expansive interpretation is directly refuted by judicial precedent.

In *Southern Company v. FCC*, the Eleventh Circuit was confronted with a similarly expansive interpretation of Section 224’s jurisdictional grant by the Commission. 293 F.3d 1338, 1343-46 (11<sup>th</sup> Cir. 2002). In the underlying order at issue in *Southern Company*, the Commission had stated:

We reaffirm our decision in the *Local Competition Order* that electric transmission facilities are not exempted from the pole attachment provisions of section 224. We reject the argument that, because **a transmission pole** is not used by the utility for stringing communications wires, it would not fall within the access obligations of

section 224(f)(1)... **To the extent an electric transmission facility is a ‘pole, duct, conduit or right-of-way,’ the facility would be subject to the access provisions of section 224.**

*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, CC Docket No. 95-185, Order on Reconsideration, 14 FCC Rcd. 18049, 18059 at ¶ 27 (Oct. 26, 1999) (emphasis added).

The Eleventh Circuit rejected the Commission’s expansive interpretation of the term “pole,” explaining that “pole” under Section 224 was a relatively narrow term:

We begin our analysis with the text of the statute. The relevant language concerning the scope of the Act’s coverage provides that “the term pole attachment means any attachment by a cable television system or a provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4). “Poles, ducts, and conduits” are regular components of local distribution systems and not interstate transmission systems. Indeed, the primary physical unit responsible for carrying transmission wire – towers – are notably absent from the definition of “pole attachment.” **This indicates to us that Congress intended the Act as a mechanism for regulating attachments on the utilities’ distribution facilities,** not their transmission facilities and systems.

*So. Co.*, 293 F.3d at 1344 (emphasis added). The foregoing language subverts CTIA’s interpretation in two important ways.

First, the Eleventh Circuit interpreted “pole” under Section 224 to mean a utility’s “distribution facilities.” CTIA has not—and cannot—argue that lighting assets qualify as electric “distribution facilities” because they are not used to distribute electricity. *Id.* at 1343-44 (noting that distribution facilities are “comprised of substations, underground cables, poles, overhead conductors, transformers, service drops, and meters **that supply power to the customers**”) (emphasis added).

Second, in determining that the Commission lacked jurisdiction over transmission poles, the Eleventh Circuit assigned significance to the categories of assets that Congress omitted from Section 224:

“Poles, ducts, and conduits” are regular components of local distribution systems and not interstate transmission systems. **Indeed, the primary physical unit responsible for carrying transmission wire – towers – are notably absent from the definition of “pole attachment.”** This indicates to us that Congress intended the Act as a mechanism for regulating attachments on the utilities’ distribution facilities, not their transmission facilities and systems.

*Id.* at 1344. Similarly, here, two of the primary physical units responsible for supporting lights—posts and standards—are “notably absent from the definition of ‘pole attachment.’” *Id.*; *see also* FERC Uniform System of Accounts, Account 373 Street lighting and signal systems, 18 C.F.R. pt. 101 (referring to light structures as “ornamental lamp posts” and “posts and standards”). Moreover, nothing in the Act contains any reference by any name to streetlights, outdoor lights, or anything else relating to lighting infrastructure.

### **3. The Commission’s Own Precedent Has Previously Acknowledged that Its Jurisdiction Under Section 224 Is Limited to Distribution Networks.**

The Commission has previously recognized the limited nature of its jurisdiction under Section 224:

The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to “piggyback” **along the distribution networks** owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd. 15499, 16084-85 at ¶ 1185 (Aug. 1, 1996) (emphasis added) (“Local Competition Order”), *overruled in-part on other grounds by So. Co.* 293 F.3d 1338. The foregoing language is

significant because, despite predating the Eleventh Circuit’s decision in *Southern Company* by several years, the Commission delineates a nearly identical jurisdictional boundary under Section 224: “the distribution networks owned or controlled by utilities.” *Id.*

Furthermore, the Commission has historically drawn an implicit distinction between “utility poles” and lighting assets, such as streetlights and streetlamps. *See, e.g., Acceleration of Broadband Deployment by Improving Wireless Siting Policies*, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, 14243 at ¶ 11 (Sept. 26, 2013) (delineating “utility poles” and “street lamps” as two different types of structures: “These technologies, including distributed antenna systems (“DAS”), small cells, and others, can be deployed on utility poles, street lamps, water towers, or rooftops, as well as inside buildings, to enhance capacity or fill in coverage gaps.”); *see also In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment*, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, Report and Order, 29 FCC Rcd. 12865, 12907 at ¶ 91 (Oct. 21, 2014) (“For purposes of this exclusion, we define utility structures as utility poles or electric transmission towers in active use by a “utility” as defined in section 224 of the Communications Act, **but not including light poles, lamp posts, and other structures who primary purpose is to provide public lighting.**”) (emphasis added).

**B. Even if the Commission Believes That It *Can* Exercise Jurisdiction Over Investor-Owned Utility Lighting Assets, it Should Decline to Do So.**

The structures used to support streetlights and outdoor/area lights are different than electric distribution poles from a structural, regulatory and functional perspective. Lighting support structures—or what CTIA clumsily refers to as “light poles”—exist primarily (and in most cases

exclusively) to provide lighting. They are not part of the pole network used to distribute electricity to customers. Further, all lighting support structures exist solely because of a particular customer request for street or outdoor area lighting. Lighting customers range from cities to HOAs to private businesses to individuals. Many are located on private property, as opposed to rights-of-way. For example, Alabama Power Company (one of Southern Company's electric utility operating companies) owns approximately 152,000 structures used primarily to support street and outdoor area lights, approximately 113,000 of which are located on private property.

The Electric Utilities do not construct “networks” of lighting support structures for the generic purpose of meeting any kind of service requirements within their designated service areas. Instead, the Electric Utilities construct street and outdoor area lights only where and when a specific customer makes a specific request. Lighting support structures thus lack the public purpose characteristic of distribution poles. Also, electric utilities are often **not** under “must serve” requirements when it comes to lighting service, drawing further distinction between lighting and distribution assets. Lights are not part of a network, either. They are frequently stand-alone assets with their own dedicated power supply. In fact, other than cities, which may request installation of lights along particular streets or in particular areas, many lighting customers have only one or a few lights and, regardless of the number, the support structure is often specifically chosen by the customer to meet decorative or aesthetic objectives. Further, because of their composition and purpose, lighting support structures—unlike distribution poles—are not generally suitable for third-party attachments.

Any collocation of communications facilities on lighting support structures is a three-party transaction at a minimum: the structure owner, the collocating entity, and the lighting customer. The fact that the lighting customer (who is also usually the underlying land owner) is often outside



the Commission's jurisdiction means that collocation on lighting support structures is not as simple as declaring that such support structures are "poles" within the meaning of Section 224.

Further, unlike distribution poles, many lighting support structures are not part of any regulated rate base. This is what is commonly referred to as "unregulated" lighting service, which is a significant portion of the lighting provided by Georgia Power Company and Alabama Power Company (both of which are electric utility operating companies owned by Southern Company). Even when the costs of lighting support structures are within a regulated rate base, those costs are usually booked in different capital and O&M accounts than distribution poles. For example, regulated lighting support structure capital and O&M costs are most frequently booked in FERC Accounts 371 and 373 (capital), and 585 and 596 (O&M). Distribution pole capital and O&M costs are booked in FERC Accounts 364 (capital) and 590 and 593 (O&M). The fact that the Commission's pole attachment rate formulas rely (and have always relied) principally on FERC Account 364 (capital) and 593 (O&M) is further indicative of the distinctions between the asset classes and the complications associated with visiting the existing pole attachment regulations on lighting support structures.

Collocation of communications facilities on lighting support structures requires a level of innovation and cooperation that cannot be achieved through forced-placed regulations. As a preliminary matter, the vast majority of lighting support structures will require complete replacement in order to accommodate small cell and other wireless antenna installations because those structures are not of sufficient strength to accommodate wireless antenna equipment. This is particularly true in highly-populated, downtown areas, as well as special event areas, where the desire for wireless network densification is the greatest. Converting a downtown decorative streetlight into a miniature cell tower requires, among other things:

- a supply chain through which to procure the specialized multi-use structures necessary to accommodate both street lighting and wireless antenna collocation;
- buy-in (if not outright approval) from the lighting customer (often a city) on the aesthetic characteristics of the replacement structure;
- a power source sufficient to meet the needs of both the streetlight and the small cell (streetlight circuits are often insufficient to meet the additional electrical load of wireless antenna equipment); and
- electric utility crews and contractors that are willing to perform, and capable of performing, the conversion.

The photographs below are an example of how Duke Energy Progress, LLC (one of Duke Energy's electric utility operating companies) successfully converted a decorative streetlight in Raleigh, North Carolina into a miniature cell tower:

**BEFORE**



**AFTER**



The conversion above is an example of what can happen when the parties are motivated to pursue “innovative and mutually beneficial solutions.” *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, 11908 at ¶ 107 (May 20, 2010) (“2010 FNPRM”).

This type of conversion does not occur through the heavy hand of government regulation. In fact, government regulation—especially of the type the Commission is accustomed to promulgating in the pole attachment context—will only hurt 5G deployment. To put it more bluntly, if the Commission regulates lighting support structure collocation anywhere near the way it currently regulates distribution pole attachments, the collocation depicted in the example above will become extinct.

## **II. THE FCC SHOULD REJECT CTIA’S REQUEST TO “AFFIRM THAT UTILITIES MAY NOT IMPOSE BLANKET PROHIBITIONS ON ACCESS TO ANY PORTIONS OF THEIR POLES.”**

CTIA appears to be raising two specific issues: (1) pole top access for wireless antennas; and (2) access to the unusable space on a pole. With respect to pole top access, CTIA states that “pole top access is persistently challenged by pole owners” despite the fact that the Commission has “explicitly declared that wireless providers have the right to access the top of a pole.” CTIA Pet. at 26. If CTIA is merely asking the Commission to repeat itself with respect to wireless pole top attachments, then the Electric Utilities have no objection. The Commission’s prohibition against blanket bans of pole-top access is a non-issue for the Electric Utilities because all of the Electric Utilities generally allow pole top antennas subject to certain limitations based on pole type, pole location and/or electric construction configuration in their service territories over which the Commission has jurisdiction. Further, while CTIA gives examples of alleged pole-top access

prohibitions in the states of New York and Connecticut, CTIA Pet. at 27, those states have reverse preempted the FCC’s jurisdiction.<sup>4</sup>

With respect to access to the unusable space on a pole, CTIA writes:

[Electric utilities] have also flatly denied access to lower portions of poles, below where utility and cable lines are typically attached—sometimes referring to this area as “unusable” space. Providers also continue to confront blanket restrictions on access to unusable space that do not comply with the requirement that they make a pole-specific showing of risks to safety or reliability.

CTIA Pet. at 26.<sup>5</sup> CTIA requests that the Commission:

...state that before a utility can refuse access to any part of a pole, the utility must “explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue.”

CTIA Pet. at 27. The Commission should decline CTIA’s request.

**A. Electric Utility Standards Requiring Pad or Pedestal Mounting of Certain Wireless Equipment Are Based on Valid Safety, Reliability and Engineering Concerns.**

Some electric utilities have adopted standards requiring that wireless equipment other than wireless antennas and risers be pad or pedestal mounted in the right-of-way, rather than being mounted on distribution poles. Such equipment may include, but is not limited to, equipment cabinets, radios, battery back-up, RF disconnect switches, and meters. Though the specifications of each wireless provider differs, and equipment configurations by the same wireless provider may

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<sup>4</sup> CTIA also refers to an instance in which an investor-owned electric utility also allegedly prohibited ancillary equipment on the lower part of its poles in New Jersey. New Jersey has reverse preempted the FCC’s jurisdiction.

<sup>5</sup> CTIA puts the word “unusable” in quotation marks, as if it is a term contrived by pole owners. The distinction between usable and unusable space not only has been long recognized by the Commission but also was originally **defined** by the Commission. See 47 C.F.R. §§ 1.1402(c) & (l).

differ from pole to pole, equipment can vertically occupy substantial portions of the pole below the communications space. Further, and particularly if the equipment of multiple wireless attachers are collocated on the same pole, the equipment can weigh 400 pounds or more. Below are examples of (1) a pole in Ameren's system with such equipment mounted on it; and (2) an example of equipment (meter and RF disconnect) mounted off-pole in Tampa Electric's system:

Wireless equipment mounted on pole in Ameren's system:



Wireless equipment mounted off-pole on Tampa Electric Company's system:



Such equipment, when it is mounted below the communications space on a utility pole, can foreclose or complicate pole climbing by linemen, which is still a regularly employed maintenance

practice even where poles are in bucket-truck-accessible locations. Further, such equipment can be a “fall hazard” for linemen working on a pole— meaning that if a lineman falls from the pole, he is likely to be injured by striking the equipment affixed to the pole even if his safety equipment keeps him from falling to the ground. In addition, when large pieces of equipment are pole mounted below the communications space, it takes out an entire quadrant (or more) for setting replacement poles, because the new pole cannot be installed close enough to the existing pole due to physical interference. Further, pole-mounted equipment adds an unbalanced load to one side of the pole and increases wind loading. These are not insignificant matters. And the fact that some electric utilities have allowed such equipment on some distribution poles does not mean that all electric utilities should be required to allow it on all distribution poles.

**B. The Enforcement of Reasonable and Non-Discriminatory Engineering Standards Does Not Constitute a Denial of Access.**

CTIA suggests a false equivalency between the adoption of reasonable engineering standards by electric utilities and blanket denials of access. However, as the Commission recognized in the NPRM preceding the adoption of the 2018 Order, this is almost never the case. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266, 3280 at ¶ 47 n. 65 (Apr. 21, 2017) (noting that a “complete denial of access . . . does not encompass a complaint alleging that unreasonable rates, terms or conditions that the utility demands as a condition of attachment (e.g., adherence to certain engineering standards) amounts to a denial of pole access”). Further, the Commission has previously held that “a utility may limit the circumstances in which a particular [attachment] technique can be used” and that “it can choose not to use or allow them at all.” *Implementation of*

*Section 224 of the Act; a National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5342 at ¶ 236 (Apr. 7, 2011) (“2011 Order”); 2010 FNPRM, 25 FCC Rcd. at 11870, ¶ 11.

All electric distribution construction and safety standards (including those in the NESC) serve as some sort of limitation on attachment techniques, locations or types. For example: most utilities have standards that require 12” of separation between communications attachments; most utilities require that communications attachments be bonded to the utility’s grounding system; and most electric utilities, in accordance with the NESC, have adopted standards prohibiting the deployment of communications equipment in the communication worker safety zone. Under CTIA’s theory, though, it would be an unlawful “blanket ban” to prohibit attachments within 12” of another communications attachment, ungrounded attachments, or attachments within the communications worker safety zone.

The Commission has long-recognized that individual utilities are entitled to enforce their own operating standards:

In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility’s individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions...As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences....

The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility’s safety and engineering practices. In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will



use...It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

Local Competition Order, 11 FCC Rcd. at 16070-71, ¶¶ 1148-49. If enforcement of NESC standards is not considered de facto denials of access, and if electric utilities are allowed to differ from the NESC and other “federal, state and local requirements,” then CTIA’s syllogism (that construction standards = access prohibitions) cannot stand as a matter of law and logic.

**C. Prohibiting Utilities from Adopting System-Wide Standards Would Frustrate Wireless Deployment.**

CTIA’s proposal that the Commission require electric utilities to review each proposal for the attachment of wireless equipment on a pole-by-pole basis, without imposing any standards of general applicability, would ultimately be detrimental to wireless deployment. First, wireless providers are concerned only with the pole or poles to which they are seeking access at any particular time. By way of contrast, electric utilities must manage their distribution infrastructure on both a macro and micro level. Consistent, system-wide construction standards are necessary to protect the very infrastructure upon which wireless carriers purport to rely.<sup>6</sup> Electric utilities have millions of distribution poles—in fact, the Electric Utilities themselves own approximately 20 million distribution poles collectively—and must consider the cumulative effect of a particular attachment practice or technique beyond the specific pole at issue in a single attachment request.

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<sup>6</sup> CTIA states that electric utility distribution poles “may be the optimal, or only, structures available for small cell deployment.” CTIA Pet. at 25. However, states are increasingly passing legislation granting wireless entities the right to set poles in the right-of-way. Further, wireless companies can collocate small cells on many other structures such as, for example, buildings. The Commission is charged with balancing the need for 5G deployment with the safety and reliability concerns of electric utilities. It is relevant to this balancing act that electric utility distribution poles are not (unlike in the case of wireline attachments) bottleneck facilities.



For example, where a utility relies upon linemen to climb poles for maintenance purposes, allowing equipment below the communications space on a single pole might pose minimal risk to overall system reliability and lineman safety. But where such equipment is allowed on a system-wide basis, the danger posed to linemen and system reliability increases exponentially. Similarly, though the interference to setting replacement poles imposed by such equipment might be manageable on any single pole, the impact of limiting replacement options on numerous poles in a feeder may have serious consequences for restoration and repair timelines. Elevating deployment on a single pole over the safety and reliability of the electric distribution network as a whole would ultimately have an adverse impact on the network. Individual utilities are required to balance these concerns in a manner consistent with that utility's experiences, work practices and local conditions. *See* Local Competition Order, 11 FCC Rcd. at 16070, ¶ 1148.

Second, uniform construction standards benefit both pole owners and wireless providers by setting uniform expectations, creating mutual understanding, and speeding deployment. If the Commission were to prohibit electric utilities from adopting construction standards, the permitting process would become less predictable. For example, if an electric utility knows that it will deny an application for certain types of pole-mounted equipment beneath the communications space due to safety and reliability concerns, prohibiting the electric utility from saying so in a non-discriminatory construction standard, and requiring the utility to respond to each application for such equipment with the same explanation, benefits no one. Similarly, where an electric utility has determined that it is generally unsafe to deploy wireless equipment on a certain category of poles—e.g., three-phase primary poles—it is better for the utility to address that issue up-front through a non-discriminatory standard, rather than provide a written explanation each time an application for such equipment is submitted. Consistent standards are, in fact, becoming

increasingly important as the Commission places greater control of the make-ready process in the hands of third parties through such policies as one-touch-make-ready and self-help remedies. A set of common expectations and requirements is essential in order to ensure the safety and reliability of the infrastructure on which wireless equipment is deployed.

**D. The Commission Rejected an Identical Request In the 2018 Order, and Should Do So Again Here.**

In the 2018 Order, the Commission stated:

133. *Utility Construction Standards and Requirements.* We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles. We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.

134. **At this time, we decline to adopt Crown Castle’s request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole because we have an insufficient record on which to reach a clear determination.** Crown Castle argues that it “has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the [unusable] space – despite the fact that this is a well-established and longstanding practice.” Two utility commenters argue that where utilities prohibit such attachments, they do so based on legitimate safety and engineering considerations, such as fall hazards, climbing obstructions, and the difficulty of moving equipment in the common space when poles have to be replaced. No other commenter addressed this issue. We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient. However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.

*In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, 7772 at ¶¶ 133-34 (Aug. 3, 2018) (footnotes omitted)

(“2018 Order”). The Commission made the forgoing statement just over a year ago. CTIA has offered nothing new here that merits the Commission “revisiting this issue” at this time.

### **III. THE COMMISSION SHOULD DENY CTIA’S REQUEST TO “CLARIFY THAT UTILITIES CANNOT SEEK TERMS THAT CONFLICT WITH THE POLE ATTACHMENT RULES.”**

In the pantheon of short-sighted proposals from communications interests in pole attachment proceedings, this one ranks among the absolute worst. Not only is the request at odds with 40+ years of Commission precedent expressly favoring negotiated solutions, but the request also undermines the potential for the very “innovative and mutually beneficial solutions” or “superior solutions” that the Commission has recognized as essential to deployment of the next generation of advanced communication facilities. 2010 FNPRM, 25 FCC Rcd. at 11908, ¶ 107; 2018 Order, 33 FCC Rcd. at 7711, ¶ 13.

To be clear, what CTIA is requesting is not a “clarification” at all—it is a complete reversal of longstanding Commission precedent rooted in both law and policy. Moreover, what communications interests routinely invoke as “black-letter law” during the negotiation of pole license agreements is often nothing more than an interpretation of the Commission’s pole attachment rules and precedent. The Commission should deny this request for declaratory ruling and reaffirm its long-standing policy in favor of, and preference for, negotiated agreements. As 5G rolls out and collocation on existing infrastructure becomes more complicated, it will be “innovative and mutually beneficial solutions,” rather than government regulation, that solves the challenges to deployment. *See* 2010 FNPRM, 25 FCC Rcd. at 11908, ¶ 107.

**A. Longstanding Commission Policy Favors Negotiated Pole License Agreements.**

CTIA's request for declaratory relief contravenes the Commission's longstanding policy of encouraging utilities and attachers to "reach bargained solutions that differ from [FCC] rules." 2018 Order, 33 FCC Rcd. at 7711, ¶ 13. The Commission has recently and clearly reaffirmed its longstanding policy favoring negotiated agreements. During the 2018 rulemaking proceedings, Crown Castle submitted the following request for "clarification" to the Commission:

"[T]he Commission should clarify that its rules serve as a floor, and that just as state requirements must not conflict with the new rules, negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace, them."

Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 4 (July 25, 2018). The Commission responded to Crown Castle's request by strongly endorsing freely negotiated agreements:

[A]t the outset, **we emphasize that parties are welcome to reach bargained solutions that differ from our rules.** Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and **encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions.**

2018 Order, 33 FCC Rcd. at 7711, ¶ 13 (emphasis added).

The preference for privately negotiated pole attachment solutions actually originates with Congress:

The basic design of S. 1547 [i.e., the Pole Attachments Act], as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems **in any case where the parties themselves are unable to reach a mutually satisfactory arrangement** and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner...

S. REP. NO. 95-580, at 15 (1977) (emphasis added). The Commission acknowledged this intent in its very first rulemaking proceedings under § 224. *See In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, Notice of Proposed Rulemaking, 68 F.C.C.2d 3, 4 at ¶ 4 (May 9, 1978) (“[Federal] regulation [of] pole attachment matters...would only operate when the parties are unable to reach an agreement and a complainant has brought a matter to the Commission’s attention.”) (citing S. REP. NO. 95-580, at 22).

Following the initial rulemaking proceedings, the Commission continued to emphasize its preference for privately negotiated agreements. *See, e.g., In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468, 472 at ¶ 39 (Jan. 9, 1989) (“We require parties to negotiate in good faith the terms, conditions and rates of pole attachment contracts prior to filing a complaint to us...[I]t is clear that parties should not file complaints with us without engaging, or attempting in good faith to engage, in serious private negotiating initiatives.”). The Commission reasoned that it prefers bargained-for agreements because:

It is not only difficult, but also might well be impossible, to identify in advance all specific types of contract terms and conditions that are unjust or unreasonable since that determination cannot be made in isolation of its factual scenario. Each pole attachment agreement has its own set of cost data, engineering requirements and terms and conditions, the interrelationship of which determines whether a particular term or condition within that agreement is onerous. A term or condition which could be found onerous when taken in the context of one particular agreement may be determined to be just and reasonable when examined in the context of another pole attachment agreement.

*Id.* at 471, ¶ 26.

Following the 1996 amendments to Section 224, the Commission explicitly acknowledged that:

**The statute, legislative policy, administrative policy, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.** Pursuant to the Commission's authority to provide for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments, attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner.

*In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd. 6777, 6783-84 at ¶ 10 (Feb. 6, 1998) (emphasis added).

The Commission has since reaffirmed its preference for privately negotiated solutions on many occasions. *See, e.g., FCC Updates Pole Attachment Rules and Policies; Clarifications to Improve Accuracy; Marketplace Solutions Still Emphasized*, CS Docket No. 97-98, News, 2000 FCC LEXIS 1684, at \*1 (Apr. 3, 2000) ("The FCC continues to emphasize the importance of private negotiations and marketplace solutions in resolving conflicts between utility companies and various leasing entities."); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-98, CS Docket No. 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, 12113 at ¶ 14 (May 25, 2001) ("We encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity. When utilities and attaching entities are innovative and provide mutually beneficial negotiated alternatives to the maximum rates, competition and the deployment of services to all communities will be fostered, resulting in the successful implementation of the 1996 Act.").

More recently, the Commission reiterated its preference for negotiated agreements within the context of the "sign and sue" rule. *See* 2010 FNPRM, 25 FCC Rcd. at 11905-09, ¶¶ 99-109.

While considering additional safeguards against the potential abuse of the “sign and sue” rule, the Commission acknowledged that utilities often exchange valid consideration for terms and conditions that might later be challenged as falling outside of the Commission’s rules:

It is important to note, however, that section 224 does not grant attachers an unfettered right to “cherry pick contractual terms they wish to disavow, while retaining the benefits of more favorable terms. An attacher is entitled to relief under the sign and sue rule only if it can show that a rate, term, or condition is unlawful under section 224, not merely unfavorable to the attacher. **Further, the Commission has recognized that in some circumstances, a utility “may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable.” Where such a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.**

As the Commission has previously stated, we “encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity.” **We want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues.**

*Id.* at 11908, ¶ 106-107 (emphasis added).

Despite the foregoing, CTIA claims that the following single paragraph from the 2018 Order casts into doubt more than forty years of firmly held Commission policy favoring freely negotiated agreements:

Allowing private contracts to dictate our policy choice would subvert the supremacy of federal law over contracts. As the Supreme Court has made clear, “[i]f the regulatory statute is otherwise within the powers of Congress...its application may not be defeated by private contractual provisions.”

CTIA Pet. at 30, citing 2018 Order, 33 FCC Rcd. at 7731, ¶ 50. CTIA claims that the foregoing language is “correct on the law and policy,” but fails to mention that the Commission was addressing a proposal by one commenter that “[One Touch Make Ready] must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole attachment work.” 2018 Order, 33 FCC Rcd. at 7730-31, ¶ 47. This has absolutely no bearing on the issues presented in

CTIA's Petition, i.e., the right of utilities and attachers to enter into voluntary pole license agreements that differ from the Commission's rules.

**B. CTIA's Requested Relief Would Undermine, Rather Than Promote, Deployment of the Next Generation of Advanced Communications Facilities.**

If parties to a pole license agreement are prohibited from "innovative and mutually beneficial solutions," then deployment of the next generation of advanced communications facilities will be the big loser. *See* 2010 FNPRM, 25 FCC Rcd. at 11908, ¶ 107. Without a legitimate possibility of *quid pro quo* (where an attaching entity exchanges a perceived regulatory entitlement for a concession from the pole owner beyond what is expressly required by the law), **pole owners will have no incentive to give attaching entities anything other than the bare minimum.** The bare minimum does not include, by way of example:

- the commitment to retain dedicated, external resources for purposes of processing high-volume fiber deployment applications and completing large-scale make-ready projects;
- the commitment to change-out poles (i.e. expand capacity) where necessary for deployment, barring a separate safety, reliability or engineering concern; or
- the commitment to longer terms (sometimes 10 years or more) that provide wireless carriers and infrastructure providers significant opportunity for return on investment at fixed prices.

Each of the above examples are **actual** concessions made to attaching entities by various Electric Utilities within the past few years. Each of these concessions **actually** facilitates deployment in a way the Commission's rules cannot, either through creating operational certainty or reducing investment risk.

The term length concession is particularly important with respect to small cell attachments at the pole top. Pole tops are limited resources. Each pole has only one. And the pole top cannot be duplicated through make-ready. But without a contractual commitment on the part of the pole owner to a particular term length, the wireless provider would be subject to displacement in the



event another wireless provider sought access to the same pole top (at a higher price) or in the event the pole owner had a higher-valued use for the pole top in its own operations. For example, if Wireless Carrier A was utilizing the pole top of Pole #1 for a small cell antenna at a regulated rate of \$100/year, and Wireless Carrier B needed access to the pole top of Pole #1 but offered a rate of \$1,000/year, then, absent a contractual commitment to the contrary, the pole owner would require Wireless Carrier A to either match the offered rate or remove its facilities. This is the very situation contemplated in *Alabama Power Co. v. FCC*, where the court held that the regulated rate was constitutionally sufficient so long as the regulated rate exceeded incremental cost and so long as there wasn't a specific showing of "lost opportunity" by demonstrating that "(1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." 311 F.3d 1357, 1371-72 (11th Cir. 2002). But a ten-year term for Wireless Carrier A provides operational and investment certainty that is not required by the Commission's rules and also concedes a valuable right by the pole owner.

Joint use agreements between electric utilities and ILECs serve as another example of this point. These agreements contain rates, terms and conditions that are remarkably different than regulated pole license agreements (primarily because most of them were negotiated at a time before the Commission asserted jurisdiction over one limited aspect of the relationship). And these agreements, through built-to-suit networks, equitable infrastructure cost sharing, and streamlined access processes, facilitated the ubiquitous deployment of communications services. Had these agreements been regulated from the outset the way that pole license agreements are currently regulated, and especially if the parties were prohibited from seeking terms and conditions that differed from the Commission's rules, the parties would **never** have entered into these agreements

and communications services would **never** have reached ubiquitous deployment (and definitely not with the cost savings realized through joint use). In short, Commission policy should be supporting “innovative and mutually beneficial solutions” like the original joint use agreements which facilitated shared infrastructure and lead to ubiquitous deployment. *See* 2010 FNPRM, 25 FCC Rcd. at 11908, ¶ 107. Commission policy should **not** limit the range of negotiated solutions, pre-judge the justness or reasonableness of those solutions, or undermine agreements that embody those solutions.

Even beyond the specific *quid pro quo* context referenced above, parties to pole license agreements might actually **agree** that the Commission’s rules are not best practice when it comes to deployment solutions. The Commission’s new overlashing rule (Rule 1.1415) is a perfect example of this because, while the rule expressly allows pole owners to require advance notice of overlashing projects, the rule interferes with both the opportunity to evaluate the proposed overlash from an engineering perspective (which was the entire purpose of advance notice) and the ability to recover the cost associated with the evaluation from the cost-causer. Even if this internally conflicted and *ultra vires* rule is upheld on review, the Electric Utilities expect that many attaching entities will nonetheless recognize the collective value in ensuring the safety and reliability of shared infrastructure and continue to support reasonable advance notice-and-review protocols that ensure recovery of a pole owner’s incremental costs. *See Am. Elec. Power Serv. Corp. v. FCC*, Docket Nos. 18-72689, 19-70490 (9th Cir. 2019). When the shared infrastructure is compromised, nobody wins (at least not in the long run).

And the Commission, for its part, appears to acknowledge this likelihood of negotiated solutions that differ from its rules. In its response brief in the above referenced appeal, the Commission stated:

Petitioners complain that the new rule does not allow them to require overlashers to conduct engineering studies or provide specifications in advance. But that rule...does “not preclude” utilities “from negotiating” such matters “with pole users.” Utilities and attachers remain free “to reach bargained solutions that differ from FCC rules,” including agreements that require overlashers to perform engineering studies and submit specifications in advance.

Brief for Resp’ts at 40, *Am. Elec. Power Serv. Corp., et al. v. FCC, et al.*, Nos. 18-72689, 19-70490 (9th Cir. Aug. 22, 2019) (internal citations removed). To put it more bluntly, if the Commission’s argument in favor of upholding a rule on appeal is that the parties can always negotiate around the rule, then it would not make sense to declare that utilities cannot even ask for terms and conditions that are inconsistent with the Commission’s rules. This is particularly true where (as with the overlashing rule) the Commission has “whiffed” on the engineering and cost recovery issues.

Even setting aside the harm that granting CTIA’s requested relief would cause, such relief is unnecessary given the Commission’s retention of the long-standing “sign and sue” rule. 2011 Order, 26 FCC Rcd. at 5292-95, ¶¶ 119-25. If an attaching entity believes it has been “forced” to accept an unjust or unreasonable term or condition in a pole license agreement, it can file a pole attachment complaint with the Commission. And the utility will have an opportunity to demonstrate that the term or provision, even if it differs from the Commission’s rules, was the result of *quid pro quo* or other good-faith, bargained-for exchange. At that point, the Commission can determine, in the fact-specific context of the particular (and entire) agreement at issue, whether the attaching entity’s challenge is merited. The time for determining whether a deviation from a Commission rule is merited is **not** through a generic, generally applicable declaratory ruling.

**C. CTIA's Requested Relief Would Be Ineffective Because Parties to Pole License Agreement Negotiations Often Have Different Understandings of the Commission's Rules.**

Even if the Commission were to grant CTIA's requested relief, it would not solve anything because pole owners and attaching entities often have different understandings of a particular rule and how it should be implemented. In fact, in the experience of the Electric Utilities, this is more often the case than not when negotiating a term or condition of a pole license agreement that is affected by the Commission's rules. Many of the Commission's rules (or at least what attaching entities often claim to be the Commission's rules) are, perhaps intentionally, ambiguous. What an attaching entity believes to be a request for a term or condition that differs from the Commission's rules is often actually a term or provision that the pole owner believes to be consistent with the Commission's rules.

By way of example, in the five years preceding the effective date of Rule 1.1415 (the overlying rule), more than one of the Electric Utilities negotiated overlying terms and conditions with a particular large, national cable television company. This particular cable company routinely insisted during negotiations that Commission precedent was "crystal clear" that utilities could not require advance notice of overlying, and that overlying was immune from considerations of safety, reliability, engineering or capacity issues. As a result, any request by a utility that either required advance notice or held overlying to the same standards as any other burden on the pole would have been, in the view of this particular cable company, inconsistent with the Commission's rules.

Another example arises in the context of Rule 1.1408(b) (formerly 1.1416(b)) in connection with cost responsibility for rearrangements and transfers of existing facilities when incidental to an electric utility's core business purposes. In other words, when an electric utility

replaces a pole for purposes of building a transformer bank or otherwise supporting electric distribution operations, who bears the transfer cost of existing third party facilities? Some cable companies have taken the position, in negotiations with various Electric Utilities, that the Commission's rules require the electric utility to bear this cost. This position, in the view of the Electric Utilities, is inconsistent with the Commission's prior interpretations of its own rule and the statutory provision upon which the rule is based. But, as relevant here, any request by a utility for an attaching entity to bear its own transfer/rearrangement costs when incidental to an electric utility's core business would be, in the view of certain cable companies, inconsistent with the Commission's rules.

An even more recent, and poignant, example arises in the context of the Commission's new ILEC complaint rule. Several of the Electric Utilities have already engaged in negotiations with certain ILECs who take the position that under the Commission's rate formulas, the ILEC cannot be assigned more than one-foot of usable space—even where the existing contract allocates 2 ½ or 3 feet of space to the ILEC and even where the uncontested data demonstrates that the ILEC is actually occupying much more space than allocated. Further, at least one ILEC is taking the position that, even if it were to agree that it occupies more than one-foot of space, it would still be entitled to a lower per pole rate than paid by a cable company occupying the same amount of space.

The point, here, is that conflicting understandings of the Commission's rules are not merely hypothetical—they are **actual**. And, in one form or another, they occur in almost **every** pole license agreement negotiation. Granting CTIA's request for declaratory ruling would not help negotiations at all; it would be disruptive, because it would only encourage obstinance. In other words, CTIA's requested relief would undermine good-faith negotiations as the solution for contested contractual issues, which would run afoul of long-standing Commission precedent.

## **CONCLUSION**

The Electric Utilities appreciate the opportunity to comment on these important issues. The Electric Utilities respectfully request that the Commission deny the declaratory rulings sought by CTIA with respect to pole attachments. CTIA's requested declaratory rulings not only would be contrary to precedent, but also would undermine deployment of the next generation of advanced communications facilities.

The Electric Utilities look forward to engaging further with the Commission on these important issues to ensure that the Commission facilitates, rather than undermines, the innovative solutions required for deployment of the next generation of advanced communications facilities.

*s/ Eric B. Langley*

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